Filed 3/18/19 Baldwin v. Woodside 05S, l.P. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THERESA BALDWIN et al., Plaintiff and Appellants, v. WOODSIDE 05S, LP et al., Defendants and Respondents.	E068267 (Super.Ct.No. RIC1606604) OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Reversed.

Kasdan LippSmith Weber Turner, Bryan M. Zuetel, Michael D. Turner, and Derek J. Scott for Plaintiff and Appellants.

Wood, Smith, Henning & Berman, Jason C. Gless, Samantha A. Pistole, and Keith E. Smith for Defendants and Respondents.

This is a construction defect action involving a single-family housing development. The conditions, covenants, and restrictions (CC&Rs) for the development

set forth prelitigation dispute resolution procedures applicable to any dispute between an owner and a developer. They required the owner to give notice of the dispute to the developer; they allowed the developer to inspect and to take corrective action; they allowed the parties to agree to voluntary mediation; they allowed any party to demand mandatory arbitration; and, if these steps failed to resolve the dispute, they required the parties to submit to a judicial reference.

The plaintiffs[1] (the Baldwin parties) filed this action against the developers[2] (the Woodside parties) without giving any advance notice (although the Baldwin parties claim that their complaint was sufficient notice). They then repeatedly sought to compel either arbitration or a judicial reference. The trial court denied both, ruling that the Baldwin parties had failed to satisfy the prerequisites in the CC&Rs.

The Baldwin parties appeal. We will hold that the trial court's orders denying a judicial reference are not appealable. However, we will also hold that the trial court erred by denying arbitration. As there is no contrary provision in the CC&Rs, it is the role of

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[1] The plaintiffs and appellants are Theresa Baldwin, Luis Aguilar, Marco Becerra, Shadi Behrouzfard, Urias Brown, Pamela Everett, Oscar Cannon, Alma Cannon, Steven Estrada, Andrew Vallejos, Gary Hoffarth, Bonita Hoffarth, William Madrigal, Menil Madrigal, David Marshall, Julia Marshall, Daniel Nunez, Norma Nunez, Ulises Otero, John Overstreet, Dorothy Overstreet, Susana Razo, Joe Zarillo, Natalie Zarillo, Doris Troney, Renea Woeller, Quinn Payne, Sharon Payne, Stanley Svete, Patsy Ann Svete, Kabel Wallace, Dawn Wallace, Yvette Nunez, and Beverly Nunez.

[2] The defendants and respondents are Woodside McSweeny 148, Inc., Woodside 05S, LP, Woodside Homes of California, Inc., Woodside Homes of Southern California, LLC, and WDS GP, Inc. According to the Woodside parties, Woodside McSweeny 148, Inc. no longer exists, having merged with Woodside 05S, LP.

an arbitrator, not the trial court, to decide whether conditions precedent to arbitration have been met.

I

FACTUAL BACKGROUND

The following facts are taken from the declarations filed in connection with the order appealed from. (See parts II & III, *post*.)

The Baldwin parties own single-family homes in a development in Hemet known as Sagecrest at McSweeny Farms. The Woodside parties built and sold these homes. Each phase of this development is governed by a separate set of CC&Rs. However, these sets of CC&Rs are identical in all relevant respects.

The CC&Rs define "Neighborhood Builder" as either Woodside McSweeny 148, Inc. or Woodside 05S, L.P. They define a "Neighborhood Builder Dispute" as including "any dispute" between "any Owners on the one hand" and "Neighborhood Builder . . . on the other hand."

The CC&Rs then provide:

"All Neighborhood Builder Disputes shall be resolved in accordance with the following alternative dispute resolution procedures:

"1.2.1 **Notice**. Any Person with a Neighborhood Builder Dispute shall give written notice of the Neighborhood Builder Dispute by personal or mail service . . . to the party to whom the Neighborhood Dispute is directed ('Respondent') describing the

nature of the Neighborhood Builder Dispute and any proposed remedy (the 'Dispute Notice').

"1.2.2 **Right to Inspect and Correct**. Commencing on the date the Dispute Notice is delivered to the Respondent and continuing until the Neighborhood Builder Dispute is resolved, the Respondent and its representatives have the right to (a) meet with the party alleging the Neighborhood Builder Dispute at a reasonable time and place to discuss the Neighborhood Builder Dispute, (b) enter the Properties to inspect any areas that are subject to the Neighborhood Builder Dispute, and (c) conduct inspections and testing (including destructive or invasive testing) in a manner deemed appropriate by the Respondent. If Respondent elects to take any corrective action, Respondent and its representatives shall be provided full access to the Properties to take and complete the corrective action. . . .

"1.2.3 **Mediation**. By mutual agreement, the parties to a Neighborhood Builder Dispute may voluntarily submit the Neighborhood Builder Dispute to mediation before a mutually-agreeable neutral mediator . . . .

"1.2.4 **Binding Arbitration**. If the Neighborhood Builder Dispute is not resolved within ninety (90) days after Respondent receives the Dispute Notice, any party may submit the Neighborhood Builder Dispute to binding arbitration by and pursuant to the rules of . . . [a] reputable arbitration service. . . .

"(a) **Interpretation**. The construction of the Lots involves and concerns interstate commerce and is governed by the provisions of the Federal Arbitration Act (9 U.S.C. § 1,

et seq.) now in effect and as the same may from time to time be amended, to the exclusion of any different or inconsistent state or local law, ordinance, regulation, or judicial rule. Accordingly, any and all Neighborhood Builder Disputes shall be arbitrated — which arbitration shall be mandatory and binding — pursuant to the Federal Arbitration Act. . . . [¶] . . . [¶]

"1.2.5 **Judicial Reference**. If a Neighborhood Builder Dispute remains unresolved after the mediation and arbitration procedures required by Sections 1.2.3 and 1.2.4 are completed, . . . then any of the parties may file a lawsuit. All lawsuits regarding Neighborhood Builder Disputes . . . must be resolved by general judicial reference . . . . [¶] . . . [¶] . . .

"1.2.6 **Statutes of Limitation**. . . . Neighborhood Builder . . . and any Owner may commence a legal action which in the good faith determination of that Person is necessary to preserve that Person's rights under any applicable statute of limitations so long as no further steps in processing the action are taken except those authorized in this Dispute Declaration." (Some bolding omitted.)

The Baldwin parties did not give the Woodside parties any written notice before filing this action. While this action was pending, however, they served a "Notice of Claims" on the Woodside parties.

The Woodside parties inspected some but not all of the subject homes. Thereafter, they served an offer to repair. The Baldwin parties took the position that the offer to

repair did not comply with the Right to Repair Act (Civ. Code, § 895 et seq.) and therefore they were free to proceed with a legal action.

II

PROCEDURAL BACKGROUND

The Baldwin parties filed this action in 2016. They alleged that they bought single-family homes from the Woodside parties that had been defectively designed and constructed. They asserted causes of action for negligence, strict liability, violation of construction standards, and declaratory relief.

After the Woodside parties answered, the Baldwin parties filed a motion to compel a judicial reference (Reference Motion). The trial court denied the Reference Motion.

The Baldwin parties then filed a motion to compel either a judicial reference or arbitration (Combined Motion).

In opposition, Woodside argued that the Baldwin parties "ha[d] not satisfied the conditions precedent to initiating arbitration," including notice of a dispute, an opportunity to inspect and to cure, and an opportunity to mediate.

The Baldwin parties responded that they had given adequate notice. They also argued that "[a]ny dispute regarding the arbitrability of this matter, including disputes regarding compliance with conditions precedent for arbitration, must be submitted to the arbitrator . . . ."

The trial court denied the Combined Motion. Regarding arbitration, it ruled that the Baldwin parties had failed to comply with the "contractual nonadversarial prelitigation procedures," and that these were "prerequisites to arbitration."

Finally, the Baldwin parties filed a renewed motion to compel arbitration (Arbitration Motion). The trial court denied the Arbitration Motion.

The Baldwin parties filed a notice of appeal from the order denying the Combined Motion.

III

APPEALABILITY

The Baldwin parties do not challenge the denial of their Reference Motion. However, they do challenge the denial of their Combined Motion — both to the extent that it refused to compel a judicial reference and to the extent that it refused to compel arbitration. They also challenge the denial of their Arbitration Motion. They appealed, however, solely from the denial of the Combined Motion.

A. *The Appealability of the Denial of the Combined Motion*.

A single order may have both appealable and nonappealable portions. (See *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053.) To the extent that the Combined Motion sought to compel arbitration, the denial of the motion is appealable. (Code Civ. Proc., § 1294, subd. (a).) However, to the extent that it sought to compel a judicial reference, the denial is not appealable. (Code Civ. Proc., § 904.1; *Brown v. Trophy-Craft Co.* (1948) 85 Cal.App.2d 246, 247-248.)

The Baldwin parties argue that we can review the portion denying a judicial reference under Code of Civil Procedure section 906, which, as relevant here, provides that a "reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ."[3]

The denial of a judicial reference, however, does not involve the merits of and does not necessarily affect the denial of arbitration. Arguably, it does substantially affect the rights of a party; however, this is insufficient, standing alone, to make it appealable. "[N]onappealable orders or other decisions substantively and/or procedurally collateral to, and not directly related to, the judgment or order being appealed are not reviewable pursuant to [Code of Civil Procedure] section 906 even though they literally may 'substantially affect[]' one of the parties to the appeal. If [Code of Civil Procedure] section 906 were interpreted without that implicit limitation, either party to an appeal could obtain review of various nonappealable, intermediate, and collateral rulings, orders,

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[3] Code of Civil Procedure section 906, by its terms, applies only in "an appeal pursuant to Section 904.1 or 904.2 . . . ." This is not such an appeal; an order denying arbitration is appealable solely pursuant to Code of Civil Procedure section 1294, subdivision (a). However, Code of Civil Procedure section 1294.2 provides that, in an appeal from an order denying arbitration, "The appeal shall be taken in the same manner as an appeal from an order or judgment in a civil action." Moreover, it goes on to provide specifically that "the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party."

or other decisions made by the trial court that . . . have no direct relevance to the other party to the appeal or to the issues on appeal . . . , thereby potentially increasing exponentially the issues to be addressed on appeal and the use of limited judicial resources to decide those issues." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 948.)

Thus, we do not have jurisdiction to review any issues, arising out of either the Reference Motion or the Combined Motion, relating to the denial of a judicial reference.

B. *The Appealability of the Denial of the Arbitration Motion.*

Because the Arbitration Motion sought reconsideration of a previous order under Code of Civil Procedure section 1008, subdivision (b), the order denying the Arbitration Motion also is not an appealable order. (*Chango Coffee, Inc. v. Applied Underwriters, Inc.* (2017) 11 Cal.App.5th 1247, 1252-1254; *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 159-160.)

We recognize that Code of Civil Procedure section 1008, subdivision (g) provides: "An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." Here, however, the Baldwin parties did not move for reconsideration under Code of Civil Procedure section 1008, subdivision (a). They could not have done so, because such a motion must be made within 10 days after notice

of the order to be reconsidered, and this time had passed. Rather, they moved for reconsideration under Code of Civil Procedure section 1008, subdivision (b).

Once again, the Baldwin parties argue that the denial of the Arbitration Motion is reviewable under Code of Civil Procedure section 906. That denial, however, is not an "*intermediate* ruling" — i.e., it was not rendered between the beginning of the action and the order appealed from. Rather, it was rendered *after* the order appealed from. "[A]ppellate court review of a nonappealable order lies only on appeal from a *subsequent* appealable judgment or order . . . ." (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 2:261, p. 2-163, italics in original.) Accepting the Baldwin parties' argument "would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal." (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1241-1242 [in appeal from order denying class certification, subsequent order denying reconsideration of the denial was not appealable].)

In sum, then, the only order that we have jurisdiction to review is the order denying the Combined Motion, and we have jurisdiction to review that order only to the extent that it refused to compel arbitration.

IV

THE REFUSAL TO COMPEL ARBITRATION

The Baldwin parties contend that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) applies, and that under the FAA, the trial court erred by refusing to compel arbitration.

We agree that the FAA applies, because the CC&Rs say it does. Choice of law clauses are "generally enforceable" (*Maxim Crane Works, L.P. v. Tilbury Constructors* (2012) 208 Cal.App.4th 286, 292), subject to certain exceptions, which the Baldwin parties are not asserting here. Moreover, the CC&Rs say that "[t]he construction of the Lots involves and concerns interstate commerce" — a fact that triggers the applicability of the FAA. (9 U.S.C. § 2.) Absent a showing of fraud, mistake, etc., the Baldwin parties are bound by this factual recital. (Evid. Code, § 622.)

We note, however, that the FAA displaces California law only if and to the extent that California law is inconsistent with it. The parties have not pointed to any way in which the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) differs from the FAA. "California courts often look to federal law when deciding arbitration issues under state law. [Citation.]" (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553.) Accordingly, while we follow federal precedent in this area, and particularly United States Supreme Court precedent, we may also follow California case law.

"'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' [Citations.] Although the

[Supreme] Court has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' [citation], it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' [Citations.]" (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83.)

"Linguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The [Supreme] Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase 'question of arbitrability' has a far more limited scope. [Citation.]" (*Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 537 U.S. at p. 83.)

"[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide. [Citations.] Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court. [Citations.]" (*Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 537 U.S. at p. 84.)

On the other hand, "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide. [Citation.] . . . [T]he Revised Uniform Arbitration Act of 2000 (RUAA), seeking to 'incorporate the holdings of the vast majority of state courts and the law that has

developed under the [Federal Arbitration Act],' states that *an 'arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled*.' [Citation.] And the comments add that 'in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and *other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide*.' [Citation.]" (*Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 537 U.S. at pp. 84-85, italics added, italics omitted.)

Here, the Woodside parties do not disagree that they are parties to the CC&Rs and that, as such, they agreed to the arbitration provision. They likewise do not disagree that this action presents a "Neighborhood Builder Dispute" and is therefore within the scope of the arbitration provision. They merely contend that the conditions precedent to their duty to arbitrate have not been satisfied. Under *Howsam*, however, the absence of any disagreement on the first two points required the trial court to grant the motion to compel arbitration. The trial court erred by ruling that conditions precedent had not been satisfied. (See *JPD, Inc. v. Chronimed Holdings, Inc.* (6th Cir. 2008) 539 F.3d 388, 392-393 [trial court erred by refusing to compel arbitration based on moving party's noncompliance with contractual preconditions; this "is exactly the type of 'condition[] precedent to an obligation to arbitrate' that *Howsam* presumptively allocated to the arbitrator."].)

The Woodside parties argue that they never agreed to submit the question of "arbitrability" to an arbitrator. However, as *Howsam* implied, "'arbitrability' is an ambiguous term that can encompass multiple distinct concepts. [Citation.]" (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1286.) Under *Howsam*, if the arbitration agreement is silent on the point, there is a presumption that "arbitrability" — in the sense of the existence and scope of an agreement to arbitrate — is to be decided by the trial court. However, there is likewise a presumption that "arbitrability" — in the sense of conditions precedent and other prerequisites to arbitration — is to be decided by the arbitrator. Thus, even absent an express agreement on the point, the issue of whether conditions precedent have been satisfied is a matter for the arbitrator.

V

DISPOSITION

The order denying the Combined Motion is reversed to the extent that it refused to compel arbitration. On remand, the trial court must enter an order compelling arbitration. The Baldwin parties are awarded costs on appeal against the Woodside parties.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.